THE ACT OF STATE DOCTRINE— JUDICIAL DEFERENCE OR ABSTENTION?

By Robert Delson *

INTRODUCTION

Notwithstanding a letter by the Legal Adviser of the State Department suggesting that the act of state doctrine should not be applied to bar consideration of the defendant's counterclaim and set-off arising out of the expropriation of the defendant's property by the Cuban Government, the U.S. Court of Appeals for the Second Circuit in ***Banco Nacional de Cuba v. First National City Bank of New York*** [1] applied the doctrine and refused to review the merits of the counterclaim and set-off.

The State Department relied on the so-called *Bernstein* exception [2] (under which the Second Circuit held that it was relieved from applying the act of state doctrine), arguing that the exception embraced all cases in which ". . . the foreign policy interests of the United States [presumably as determined by the Executive] do not require the application of the act of state doctrine. . . ." [3] The majority opinion differed with the State Department. It held that the Executive suggestion was not conclusive on the court and that the *Bernstein* exception should be limited as far as is possible to its precise facts. The court then proceeded to make its own independent evaluation of whether such facts were present.[4] Finding that the *Bernstein* facts were not present in the instant case, the court held that the exception was not available. Judge Hays' dissent essentially concurred with the views of the Legal Adviser.

Judge Hays, in his dissent, pointed out that the facts in *Bernstein* were set forth not by the court but by the State Department in its letter. In his view, the court in *Bernstein* did not make an independent evaluation of the Executive suggestion that the act of state doctrine need not be applied and the court in the instant case similarly "must accept the [State Department] letter as an expression of Executive policy and go no further." [5] An "independent evaluation of the merits of the State De-

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[1] 442 F.2d 530 (2d Cir., 1971); 65 A.J.I.L. 812 (1971); cert. granted, 92 S. Ct. 79, Oct. 12, 1971.

[2] Bernstein *v.* N. V. Nederlandsche-Amerikaansche, etc., 210 F.2d 375 (2d Cir., 1954); 48 A.J.I.L. 499 (1954).

[3] 442 F.2d 530, at 538; 65 A.J.I.L. 391 at 393 (1971).

[4] 442 F.2d 530 at 534.

[5] *Ibid.* at 538. Judge Hays' dissent stated, *inter alia*: "More fundamental than a mere lack of conformity with *Bernstein*, however, is the fact that the majority, by applying the act of state doctrine after an independent evaluation of the merits of

partment's decision," according to Judge Hays, would usurp "the same executive prerogative which it is the function of that doctrine to preserve."

Written with Judge Hays' customary erudition and thoughtfulness, the dissent seems persuasive, since it appears to be in conformity with the premise of the doctrine that the conduct of foreign relations is committed by the Constitution to the political departments of the Government.[6] In this approach, the purpose of the doctrine is to avoid embarrassment to the Executive in its conduct of foreign policy and the courts are required to give conclusive effect to Executive suggestions in order to permit the Executive to carry out its foreign policy more effectively.

But the majority opinion appears to be more persuasive, despite the fact that it does not elaborate the rationale for its view that Executive suggestions are not conclusive. The history of the doctrine indicates that its function is not to effect unquestioning judicial deference to the Executive, but to achieve a result under which diplomatic rather than judicial channels are used in the disposition of controversies between sovereigns. The embarrassment to be avoided is not so much to the Executive as to the foreign policy goals of the government. Consequently, except in the *Bernstein* situation, the doctrine would require that judicial intervention be precluded even if the Executive itself called upon the courts to pass upon the validity of foreign acts. In other words, the Executive is not to be the sole judge of whether our foreign policy is prejudiced by judicial intervention, especially since the doctrine is of judicial origin, and the judiciary may assert the right to determine how the doctrine should be applied. The issue as thus formulated is not one of judicial deference to Executive suggestion but rather of deference to an established theory of judicial abstention.

From the summary of the act of state cases which follows below, it will be noted that the courts have applied the doctrine to all acts of a foreign state. In *Banco Nacional de Cuba* v. *Sabbatino*[7] the Court expressly limited its decision as to the applicability of the doctrine to the facts of that case; namely, acts of nationalization occurring under certain specific circumstances. Similar facts were involved in the instant case and consequently this note also deals primarily with the applicability of the doctrine to such acts.

Factual Background

Banco Nacional de Cuba's (hereinafter "Banco Nacional") suit against First National City Bank of New York (hereinafter "Citibank") in the Southern District Court of New York was based on the following facts: Following the Castro government's expropriation of Citibank property in Cuba pursuant to Cuban Law 851, Citibank sold collateral securing a $10,000,000 loan which it had made to Banco Nacional prior to the change in the Cuban Government. From the sale of that collateral, Citibank

the State Department's decision, is usurping the same executive prerogative which it is the function of that doctrine to preserve."

[6] See, *e.g.*, Oetjen v. Central Leather Co., 246 U.S. 297; 12 A.J.I.L. 421 (1918).

[7] 376 U.S 398; 58 AJ.I.L. 779 (1964).

received an amount substantially in excess of that required to discharge the $10,000,000 principal sum and 4% interest thereon. The exact amount received by Citibank was conceded to be at least $11,892,448 and perhaps as much as $12,412,000. Banco Nacional sued to recover the excess realized on that sale.

In the District Court, Citibank raised a series of counterclaims and set-offs based principally on the contention that since the Cuban Government had confiscated its property in Cuba in violation of international law, Citibank was entitled to retain the excess on the sale of the collateral as a set-off against the value of the confiscated property. Judge Bryan in the Southern District granted summary judgment to Citibank.[8]

This decision was reversed by the Circuit Court of Appeals,[9] which held that Cuba's confiscation of Citibank's property was an act of state and that under *Banco Nacional de Cuba* v. *Sabbatino*,[10] the act of state doctrine foreclosed judicial inquiry into the validity of that confiscation under international law. Moreover, the Circuit Court held that the Hickenlooper Amendment to the Foreign Assistance Act of 1964 did not apply so as to bar the application of the act of state doctrine. The court held that the Hickenlooper Amendment applied only "when some other entity attempted to market the American firm's expropriated property and some aspect of such an attempted transaction took place in this country."[11] Accordingly, the Circuit Court concluded that allowing Citibank its claimed set-off against the allegedly unlawful expropriation was an error, and the court remanded the case to the District Court for a factual finding as to the amount by which the proceeds of the sale of the collateral exceeded the amount owing on the loan, which excess was directed to be paid to Banco Nacional.

Citibank petitioned for a writ of certiorari on October 13, 1970. On November 17, 1970, the Legal Adviser to the Department of State wrote a letter to the United States Supreme Court expressing the views of that Department with respect to the case. The State Department's letter stated, *inter alia:*

> . . . [T]he foreign policy interests of the United States do not require the application of the act of state doctrine to bar adjudication of the validity of a defendant's counterclaim or set-off against the Government of Cuba in these circumstances.
>
> The Department of State believes that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases.[12]

[8] 270 F.Supp. 1004 (S.D.N.Y., 1967); 62 A.J.I.L. 182 (1968).

[9] 431 F.2d 394 (2d Cir., 1970); 65 A.J.I.L. 195 (1971).

[10] Cited note 7 above.

[11] 431 F.2d at 402. It may be noted that the Court of Appeals of New York had, some years earlier, also interpreted the Hickenlooper Amendment as applying only to property brought into the United States. While the majority opinion cites this case at note 13, the case is not discussed nor seemingly relied upon. See French *v.* Banco Nacional de Cuba, 23 N.Y.2d 46, 295 N.Y.S.2d 433, 242 N.E.2d 704 (1968); 63 A.J.I.L. 640 (1969).

[12] Appendix to 442 F.2d 530 at 538 (2d Cir., 1971); 65 A.J.I.L. 393 (1971).

The Supreme Court granted certiorari and remanded the case to the Circuit Court of Appeals ". . . for reconsideration in light of the views of the Department of State . . ." [13] The Court noted that it ". . . express[ed] no views on the merits of the case." [14] On remand, the majority of the Court of Appeals held that: ". . . we see no reason to change our initial decision on this appeal" [15] and again reversed and remanded the case.

Proceedings in the Court of Appeals on Remand

Citibank, on remand before the Court of Appeals, urged the reversal of that court's prior decision on two seemingly interrelated grounds. The first argument made by Citibank was that, while the act of state doctrine was designed to avoid judicial interference with the Executive's rôle of formulating foreign policy, no such interference was possible in the instant case. According to Citibank, the fact that the foreign sovereign itself "sought the process and procedures of United States law" [16] removed the danger of encroaching upon the Executive Branch's prerogative in the area of foreign affairs, and that accordingly the act of state doctrine did not bar adjudication of the defendant's set-off or counterclaim. As evidence of this, Citibank cited the State Department's letter which stated that U.S. foreign policy interests did not require the doctrine's application.

An apparently separate argument made by Citibank was that, in any event, the State Department's letter relieved the Judicial Branch from any restraint upon the exercise of its jurisdiction to adjudicate the defendant's counterclaim or set-off.[17] *Bernstein* v. *N.V. Nederlandsche-Amerikaansche*, etc.,[18] was cited as authority for this proposition.

Banco Nacional, on the other hand, argued that the *Bernstein* exception was inapplicable because "The facts in the *Bernstein* case bear not the slightest resemblance to the facts in this case." [19] Banco Nacional also argued that the new exceptions to the act of state doctrine set out in the State Department's letter with respect to counterclaims, where

> (a) the foreign state's claim arises from a relationship between the parties existing when the act of state occurred; (b) the amount of relief to be granted is limited to the amount of the foreign state's claim; and (c) the foreign policy interests of United States do not require application of the doctrine [20]

were unreasonable, since

> The proposed rule would thus make the application of an important doctrine depend on accidents of pleading which have little to do with the merits of the case and nothing at all to do with the considerations upon which the Act of State doctrine is founded.[21]

[13] 400 U.S. 1019 (1971). [14] *Ibid.*
[15] 442 F.2d at 532.
[16] See Brief of Defendant-Appellant before Court of Appeals on remand at p. 3.
[17] *Ibid.* at p. 5.
[18] 210 F.2d 375 (1954), cited note 2 above.
[19] See Brief of Plaintiff-Appellee before the Court of Appeals on remand at p. 4.
[20] See letter of Legal Adviser of Department of State, cited note 12 above, at 537.
[21] See Brief cited note 19 above, at p. 5.

Finally, Banco Nacional noted that in a prior case, *Pons* v. *Republic of Cuba*,[22] the State and Justice Departments failed to make any suggestions to the court on the applicability of the act of state doctrine, notwithstanding a judicial invitation that these departments file briefs in the case. Banco Nacional stated that, since the facts in *Pons* were the same as those present in the instant case, the change in the Executive Branch's position was due to the new Administration's policy. Arguing that such changes in policy should not affect the courts, Banco Nacional stated:

> It is quite another thing, however, to expect the Judiciary to follow every change of such policy. The result would be to turn the courts into an instrument of the foreign, or perhaps even the domestic, policies of the Administration. This is contrary to the principle of the separation of powers and inconsistent with the integrity of the Judicial Branch of the Government, which cannot and should not be placed in a position where its decisions on important questions of law vary from time to time as one administration succeeds another.[23]

In its decision, the majority of the court examined only the question whether, by virtue of the State Department's letter, the *Bernstein* exception was applicable. N[redacted] involved (a) the "acts of state . . . performed by a German government with which this country had gone to war"; (b) a foreign government which was no longer in existence at the time of the litigation; (c) acts which "had been condemned throughout the world as crimes against humanity"; and (d) a State Department letter which "went so far as to indicate that it was the affirmative policy of our government to restitute identifiable property to *all* those victimized by the Nazi confiscation, not merely . . . to those who assert counterclaims or set-[redacted] the majority held that the "State Department's letter here does not bring this case within the narrow *Bernstein* exception."[24]

The majority thus assumed but did not discuss the question whether the court was competent to evaluate the applicability of the *Bernstein* exception, or whether it was bound by the suggestion of the Executive advising the court that the act of state doctrine was not applicable. Judge Hays' dissent, on the other hand, sets forth the rationale of his position that the court did not have the competence to act contrary to the State Department's suggestion.[25] The failure of the majority to elaborate on this issue, as well as the absence of any prior judicial treatment of this question, makes this case ripe for consideration by the Supreme Court.

Act of State Doctrine—An Historical Analysis

The issue of the extent to which the courts must be guided by Executive suggestions with reference to the application of the act of state doctrine can be resolved only by an examination of the nature and function of that doctrine, and an examination of the manner in which that func-

[22] 294 F.2d 925 (D.C. Cir., 1961); cert. den., 368 U.S. 960; 56 A.J.I.L. 215 (1962).
[23] See Brief cited note 19 above, at pp. 9–10.
[24] 442 F.2d at 534 and 535.
[25] See note 5 above.

tion can best be effectuated. The following discussion of the historical development of the act of state doctrine in the United States suggests that the purpose of the doctrine is not to secure judicial deference to the Executive Branch, *i.e.*, to compel the courts to follow all Executive suggestions with reference to the propriety of examining the validity of foreign sovereign acts, but rather to assure that U.S. foreign relations remain the exclusive responsibility of the Executive Branch, and that the Executive may not shift such responsibility to the courts. Hence, the courts should abstain from passing upon the validity of foreign sovereign acts notwithstanding State Department suggestions to the contrary. The only exception to this rule, the "*Bernstein* exception," is more apparent than real, as will appear below.

The origins of the act of state doctrine in American jurisprudence lie in the Supreme Court decision in *Underhill* v. *Hernandez*.[26] In a suit by an American citizen against a Venezuelan Military Governor for unlawful confinement and assault, the Court held that:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[27]

While the opinion of Chief Justice Fuller never elaborated upon whether the source of this rule was to be found in international law, comity, conflicts, or mere political expediency, the Court, in the next act of state case which came before it, indicated that the rule was a principle of comity. *Oetjen* v. *Central Leather Co.*[28] involved a suit by the assignee of the original owner of some hides against the holder of the hides. The hides had been seized by Mexican revolutionary forces which subsequently succeeded in coming into power. The Court dismissed the plaintiff's action for replevin, stating:

> The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of a court, such as we have here, as it was held to be in the cases cited, in which claims for damages were based upon acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign state to be re-examined and perhaps condemned by the courts of another would very certainly "imperil the amicable relations between governments and vex the peace of nations." [29]

On the same day that *Oetjen* was decided, the Supreme Court also handed down its decision in *Ricaud* v. *American Metal Co.*[30] The facts of this case were substantially similar to those present in *Oetjen* except that the original owner of the confiscated goods in this case was an Ameri-

[26] 168 U.S. 250 (1897).
[27] *Ibid.* at 252.
[28] Cited note 6 above.
[29] 246 U.S. at 303.
[30] 246 U.S. 304; 12 A.J.I.L. 417 (1918).

can. In this case also, however, the Court, citing *Underhill* and *Oetjen*, stated:

> The fact that the title to the property in controversy may have been in an American citizen, who was not in or a resident of Mexico at the time it was seized for military purposes by the legitimate Government of Mexico, does not affect the rule of law that the act within its own boundaries of one sovereign state cannot become the subject of re-examination and modification in the courts of another. Such action when shown to have been taken, becomes, as we have said, a rule of decision for the courts of this country. Whatever rights such an American citizen may have can be asserted only through the courts of Mexico or through the political departments of our Government.[31]

It is interesting to note that in *Ricaud*, the act of state doctrine was referred to as "a rule of law," whereas in *Oetjen* it was referred to as a "principle . . . of international comity."

Viewed together, these three cases indicate that, prior to the *Bernstein* litigation, the Supreme Court viewed the act of state doctrine as a legal rule based upon the premise that the act of a foreign sovereign, performed within its own territory, could not be reviewed by an American court without imperiling the amicable relations between governments, since the doctrine rested on the highest considerations of international comity and expediency. The principal practical consequence of the doctrine was that protection of the rights of American nationals or others affected by foreign sovereign acts was to be placed in the hands of the Executive and kept out of the courts. No suggestion was ever made by the Executive that the courts should intervene until the *Bernstein* case. It is inconceivable that such a suggestion could have been made in the context of the early act of state cases, since the very purpose of the concept was to preclude judicial involvement. Consequently, it was not designed to secure judicial deference, but rather to mandate judicial abstention. The necessity of judicial abstention in favor of the political branches with reference to claims against foreign sovereigns was explained by one court as follows:

> Considerations of comity, and of the highest expediency, require that the conduct of states, whether in transactions with other states or with individuals, their own citizens or foreign citizens, should not be called in question by the legal tribunals of another jurisdiction. The citizens of a state have an adequate redress for any grievances at its hands by an appeal to the courts or the other departments of their own government. Foreign citizens can rely upon the intervention of their respective governments to redress their wrongs, even by a resort, if necessary to the arbitrament of war. It would be not only offensive and unnecessary, but it would imperil the amicable relations between governments, and vex the peace of nations, to permit the sovereign acts or political transactions of states to be subjected to the examination of the legal tribunals of other states.[32]

[31] 246 U.S. at 310.

[32] Underhill *v.* Hernandez, 65 F. 577 at 579 (1895). For other instances in which the Supreme Court applied the act of state doctrine as a rule of international comity

It was not until the Second Circuit Court of Appeals' decision in *Bernstein* v. *N. V. Nederlandsche-Amerikaansche,* etc.[33] that a court held that judicial review of the act of a foreign state was permissible by dint of a State Department letter to that effect. *Bernstein* v. *N. V. Nederlandsche-Amerikaansche,* etc.[34] was the third in a series of cases in which the plaintiff Bernstein sought to attach and recover some of the proceeds of his former property allegedly confiscated by the Nazi German Government between 1937 and 1939. In the first case, *Bernstein* v. *Van Heyghen Freres Societe Anonyme,*[35] the court held that the act of state doctrine prevented it from inquiring into the validity of the confiscation of the plaintiff's property by the Nazi Government, citing *Underhill* and *Oetjen.* However, the opinion of Judge Learned Hand indicated that the court could be relieved of the act of state doctrine's restraint if the Executive Branch rendered the doctrine inapplicable:

> Thus the case is cleared for the second question: whether since the cessation of hostilities with Germany our own Executive, which is the authority to which we must look for the final word in such matters, has declared that the commonly accepted doctrine which we have just mentioned, does not apply.[36]

The court went on to decide, however, that the Executive had not acted to relieve it of the doctrine's restraint. Subsequently *Bernstein* brought suit with reference to other assets confiscatd by the Nazis and transferred to third parties. In this case, *Bernstein* v. *N.V. Nederlandsche-Amerikaansche,* etc.,[37] the Second Circuit again held that, because the confiscation of the plaintiff's properties was accomplished by officials of the German Government, the court could not question the legality of the taking. Following this decision, the Acting Legal Adviser of the Department of State, in response to a letter from Mr. Bernstein's counsel, advised the court that:

> The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.[38]

The Court of Appeals thereupon amended its prior decree and held that the letter from the Acting Legal Adviser removed the act of state doctrine as a bar to judicial consideration of the validity of the Nazi confiscation, and ordered the District Court to try the case on the merits.[39]

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rather than by virtue of any deference to the Executive Branch, see, *e.g.,* American Banana Company *v.* United Fruit Co., 213 U.S. 347; 3 A.J.I.L. 1006 (1909); Shapleigh *v.* Mier, 299 U.S. 468; 31 A.J.IL. 528 (1937).

[33] Cited note 2 above. [34] *Id.*

[35] 163 F.2d 246 (2d Cir., 1947); 42 A.J.I.L. 217 (1948).

[36] 163 F.2d at 249.

[37] 173 F.2d 71 (2d Cir., 1949); 44 A.J.I.L. 182 (1950).

[38] 20 Dept. of State Bulletin 592 at 593 (May 8, 1949).

[39] The case was subsequently settled.

Bernstein has been viewed by some, *e.g.*, Judge Hays, as support for the proposition that, once the State Department acts to relieve the courts from the act of state doctrine's restraint, the courts must refrain from applying the doctrine. It is submitted that such a reading of the case may be too broad. On its facts the case stands only for the proposition that the act of state doctrine need not be applied where a court is called upon to review the legality of the acts of a foreign sovereign which no longer exists, and the State Department advises the court that such review is consistent with U.S. foreign policy.[40] Interpreted in this way, the *Bernstein* exception is consistent with the prior act of state decisions of the United States Supreme Court, since judicial involvement in an examination of the validity of the act of a foreign state which no longer exists cannot result in an affront to the dignity of such foreign sovereign.

This narrower interpretation of the *Bernstein* exception finds some support by negative inference in the most recent Supreme Court decision involving the act of state doctrine, *Banco Nacional de Cuba* v. *Sabbatino*.[41]

While in *Sabbatino* no Executive suggestion had been made and the Court, therefore, was not faced with the issue of what effect the Judiciary must give to such suggestions, the Court did discuss the basis of the doctrine. First, the Court disavowed the initial bases of the act of state doctrine which it had stated in *Underhill, Oetjen* and *Ricaud*, namely, that the doctrine was based on principles of international law and comity. Rather, Justice Harlan's opinion noted that the doctrine had "constitutional underpinnings," namely, in the concept of separation of powers and the necessity of avoiding judicial hindrance of the Executive Branch's international goals, and that the doctrine's "continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches . . ." [42] In discussing the manner in which the doctrine works to properly distribute judicial and executive functions, Justice Harlan's opinion indicated that it was judicial *examination* of foreign acts of state, rather than the failure to make such an examination, which the act of state doctrine was designed to avoid. "The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of *passing on the validity* of foreign acts of state may hinder rather than further the country's pursuit of goals, both for itself and for the community of nations as a whole." (Emphasis added.) [43]

It would, therefore, appear that while the initial rationale of the act of state doctrine, in international law and/or comity, has been at least partially discarded by the Court,[44] Justice Harlan's opinion in *Sabbatino*

[40] In its brief as Amicus Curiae before the Court in Sabbatino, the United States characterized the Bernstein exception as "an exceedingly narrow one."

[41] 376 U.S. 398 (1964).

[42] *Ibid.* at 427.

[43] *Ibid.* at 423.

[44] While the Court on the one hand disavowed principles of international law and comity as bases of the act of state doctrine, Justice Harlan did state that ". . . historic notions of sovereign authority do bear upon the wisdom of employing the act of state doctrine." 376 U.S. at 421.

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[45] *Ibid.* at 428.

[46] Henkin, "The
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[47] See Lowenfeld,
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confirmed the Court's position that the act of state doctrine was designed to avoid judicial examination of foreign acts of state, an examination which could constitute an embarrassment to the political branches of government, and impede the nation's foreign relations. Nowhere in the Court's opinion is there any indication that the failure of the courts to examine the validity of a foreign sovereign's act could be embarrassing to the Executive. The Court did indicate that the doctrine might be limited to permit examination of the validity of a foreign expropriation under certain circumstances, such as where the foreign act violated highly codified principles of international law, the issue raised was of minimal importance to the conduct of our foreign relations, and the government involved no longer existed.[45] The Court did not consider whether it would disregard the act of state bar to judicial review of the legality of a foreign sovereign's act if the State Department directed that it do so. While it is difficult to support a proposition on the basis of what a court does not say, at least one other writer has read *Sabbatino* as evidencing the Court's reluctance to be bound by all State Department suggestions in act of state cases. Professor Louis Henkin, in explaining why Justice Harlan avoided basing the act of state doctrine upon the necessity of precluding judicial conflict with the Executive, stated:

> Perhaps he was reluctant to have the courts appear less-than-independent, their powers less separate, particularly in regard to the Executive. Perhaps the Court was reluctant even to appear to be abdicating judicial functions and accepting political direction from the executive branch. Perhaps it feared that basing Act of State on the authority of the Executive would also subject the courts to *ad hoc* determinations in the decision of particular cases which would make the courts appear as the handmaiden of the State Department.[46]

From the brief sketch of the history of the act of state doctrine, it appears that the doctrine's purpose is not the simplistic one of requiring the Judiciary to defer to the Executive in all cases involving a challenge to the validity of foreign acts. The purpose rather seems to be to avoid judicial interventions other than those within the *Bernstein* exception, and to entrust the handling of such challenges to diplomatic negotiations.

Proponents of the view that the Court of Appeals in the instant case was bound to follow the Legal Adviser's suggestion might rely upon judicial deference to State Department suggestions in sovereign immunity cases as support for their position. However, it has been pointed out by a former Deputy Legal Adviser of the State Department that "Refusal by the State Department to recognize and allow a request for immunity is probably not conclusive on the courts in the same way as an affirmative suggestion for immunity, since foreign relations will presumably not be disturbed if a country is granted immunity even without State Department intercession." [47] In this view, the courts apparently are not bound

[45] *Ibid.* at 428.

[46] Henkin, "The Foreign Affairs Powers of the Federal Courts," 64 Columbia Law Rev. 805, at 822 (1964).

[47] See Lowenfeld, "Claims Against Foreign States—A Proposal for Reform of United States Law," 44 N.Y.U. Law Rev. 901, at 911 (1969).

to automatically follow negative State Department suggestions in sovereign immunity cases.[48]

Even if State Department suggestions in sovereign immunity cases were regarded as conclusive, whether they suggest a grant or denial of immunity, this should not affect the attitude of the courts in act of state cases. The desirability of following Executive suggestions in sovereign immunity cases arises because there is no presumption in favor of sovereign immunity,[49] and, unless the Executive makes an affirmative suggestion and the courts follow it, immunity may be improperly denied. In the case of the act of state doctrine, however, there exists a presumption of its applicability within the framework established by *Sabbatino* for applying the doctrine [50] which insures that the foreign act will not be judicially reviewed in the absence of an Executive suggestion.

Moreover, even if the courts were bound to follow a negative suggestion as to immunity, injury to the dignity of a foreign sovereign is unlikely in such a case, since the denial of immunity is normally based on the absence of the elements necessary to create immunity under generally recognized principles of international law, such as in the cases involving commercial transactions under the restrictive theory of sovereign immunity.[51] On the other hand, there is no generally accepted legal basis for refusing to apply the act of state doctrine and thus such refusal is likely to be viewed as being politically motivated.

Conclusion

Historically, the act of state doctrine has mandated that the courts not review the acts of a foreign government, "extant and recognized," [52]

[48] The Tate Letter recognized that the State Department's adoption of the restrictive theory of sovereign immunity was not binding on the courts: "It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so." 26 Dept. of State Bulletin 984 at 985 (1952).

[49] Indeed, at least according to one court, the burden of proof in sovereign immunity cases is on the government claiming such immunity. See Pan American Tankers Corp. *v.* Republic of Viet-Nam, 296 F.Supp 361, at 364 (S.D.N.Y., 1969); 63 A.J.I.L. 826 (1969).

[50] Cited note 7 above.

[51] See letter dated May 19, 1952, from Acting Legal Adviser Tate to Acting Attorney General Perlman, note 48 above. It is well to note that judicial deference to Executive suggestions in sovereign immunity cases has itself been under sharp criticism. This criticism has been based both on the fact that the question of whether to grant immunity is a question of international law and should therefore be decided by the Judicial rather than Executive Branch (see Jessup, "Has the Supreme Court Abdicated One of Its Functions?" 40 A.J.I.L. 168 (1946)), and upon the ground that since, under the restrictive theory, questions of sovereign immunity turn upon findings of fact, the courts are better equipped than the State Department to resolve sovereign immunity issues. See speech by Murray J. Belman, former Deputy Legal Adviser of the Department of State, 1969 Proceedings, American Society of International Law at 184. It is thus paradoxical that at the same time that the question of judicial deference to the Executive has been under sharp criticism in sovereign immunity cases, an attempt is being made to extend the scope of such deference to act of state cases.

[52] Banco Nacional de Cuba *v.* Sabbatino, 376 U.S. at 428.

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[53] See note 32 above.

since this would "imperil the amicable relations between governments, and vex the peace of nations." [58] The *Bernstein* exception is, as noted above, substantially consistent with this view of the doctrine, since the sovereign whose actions were involved in that case was no longer in existence at the time of suit.

In this perspective, the courts have at least as great a responsibility for enforcing the act of state doctrine as the Executive, and are under a duty to refuse to follow a negative Executive suggestion where such refusal is necessary to assure conformity with the doctrine.

Thus, the act of state doctrine historically has been based on a policy which seeks to secure the use of diplomatic rather than judicial channels in the disposition of controversies between sovereigns. In view of the importance attached to this practice in the conduct of our foreign affairs, it is reasonable to conclude, as did the majority in the instant case, that the doctrine should be implemented by a judicial refusal to intervene, if the court concludes such abstention is required, even if intervention be suggested by the Executive itself. If there is a question of judicial deference involved in the act of state doctrine, it is a deference to the overriding policy of judicial abstention, not to Executive suggestions.

This is consistent with reading the act of state doctrine as a means for effectuating the principle of separation of powers and the preservation of the Executive prerogative, while also preserving the "judicial prerogative" to decide legal questions on the basis of legal rather than political criteria. As noted by counsel for Banco Nacional in its brief before the Court of Appeals on remand, if the act of state doctrine is interpreted as merely mandating judicial deference to Executive suggestions, the major purpose of the doctrine—securing the separation of the powers of the judicial and political branches of government—would be defeated.

Despite Judge Hays' effective statement in support of judicial deference to Executive suggestion, whether of abstention or intervention, there is reason for concern that this position, if taken to its logical conclusion, may render judicial decisions on a question of law—the applicability of the act of state doctrine—subject to the changes in national policy which are often concomitant with changes in Administration. Thus, to construe the act of state doctrine as *compelling* such judicial deference to political decisions would be to ignore the purpose of the doctrine in securing the separation of powers.

[58] See note 32 above.